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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 CRAFTY PRODUCTIONS, INC. *et*
12 *al.*,
13 Plaintiffs,
14 v.
15 THE MICHAELS COMPANIES,
16 INC., *et al.*,
17 Defendants.

Case No. 15-cv-719-BAS-JLB

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS**

[ECF No. 233]

18 Plaintiffs Crafty Productions, Inc. ("CPI") and Crafty Productions, LLC
19 ("CPL") (collectively "Plaintiffs") commenced this action against numerous
20 defendants alleging copyright infringement of CPI's original craft designs and
21 products, trade dress infringement, intentional interference with prospective business
22 advantage, unfair competition, breach of contract, and fraud. Many parties were
23 listed as defendants in the first complaint, but various defendants have been
24 dismissed for lack of personal jurisdiction. (ECF No. 213.) As relevant here,
25 Defendants The Michaels Companies, Inc. and Michaels Stores, Inc. (collectively,
26 "Michaels") and Hobby Lobby Stores, Inc. moved to dismiss Plaintiffs' prior
27 complaint for failure to state a claim. (ECF No. 90.) The Court granted the motion
28 to dismiss and granted Plaintiffs leave to amend. ("Prior Order," ECF No. 214.)

1 Plaintiffs filed a second amended complaint against Michaels; Plaid Enterprises, Inc.;
2 Hobby Lobby Stores, Inc.; Party City Holdings, Inc.; and Party City Corporation.
3 (“SAC,” Second Amended Complaint, ECF No. 232.) Plaintiffs allege trade dress
4 infringement, intentional interference with prospective business advantage, and
5 unfair competition. Michaels moves to dismiss the second amended complaint.
6 (“Mot.,” ECF No. 233.) Defendants Hobby Lobby; Party City Holdings, Inc.; Party
7 City Corporation; and Plaid Enterprises, Inc. join the Motion to Dismiss with respect
8 to paragraphs III(A)(1)-III(A)(4) and III(B) of the Motion. (ECF Nos. 235, 236,
9 238.) Plaintiffs filed an opposition to the Motion, (“Opp’n,” ECF No. 239), and
10 Michaels filed a reply in support of the Motion, (“Reply,” ECF No. 240).

11 The Court finds this Motion suitable for determination on the papers and
12 without oral argument. Civ. L. R. 7.1(d)(1). For the reasons stated below, the Court
13 **GRANTS** Defendants’ Motion.

14 **I. FACTUAL BACKGROUND¹**

15 Plaintiff CPI has created various “original product concepts and designs,
16 including many creative, decorative wood products.” (SAC ¶ 11.) Sometime in
17 1995, CPI hired Michelle Faherty as a sales representative for some of its products.
18 (*Id.* ¶ 13.) Ms. Faherty asked permission to take samples of certain products so she
19 could obtain a manufacturing cost estimate from a factory she knew in China. (*Id.*)
20 She did so, and then CPI began using a Chinese manufacturer owned by Kevin Xiao
21 and/or Tony Zhu for cost-saving purposes. (*Id.*)²

22 In 2009 or 2010, CPI learned that replicas of its products were being sold in a
23 crafts and toys product catalog from “Zhejiang Hongye Art & Craft Co., Ltd”
24 (hereinafter, “Hongye”). (*Id.* ¶ 15.) CPI had not approved these sales and had never
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27 ¹ A more comprehensive background can be found in the Court’s prior order, (ECF No. 214). The
28 following background history contains the relevant allegations as to the remaining Defendants.

² Zhu’s company is called Fuqing. (SAC ¶ 29.) Plaintiffs and Fuqing have arbitrated their claims.
(ECF Nos. 215, 228.)

1 heard of Hongye. (*Id.*) CPI learned that the Hongye factory was shipping CPI's
2 wood products to Michaels and Plaid. (*Id.* ¶ 16.) Plaid is CPI's competitor and
3 supplies products to retailers, including Hobby Lobby and Michaels. (*Id.* ¶ 19.)

4 CPI insisted on visiting China to meet Zhu and see his manufacturing facilities.
5 (*Id.* ¶ 16.) On this trip, CPI first visited the Hongye factory, where it saw on display
6 many of CPI's "original designs and products." (*Id.* ¶ 17.) Faherty allegedly had to
7 lie to the Hongye representative to arrange a tour of the factory for CPI. (*Id.*) "There
8 appeared to be no effort by the manufacturer to disguise the fact that they were
9 producing unauthorized CPI products." (*Id.*) CPI alleges it saw a frame at the factory
10 that was "substantially similar to one of CPI's designs" but had the name "Plaid" on
11 the back. (*Id.* ¶ 19.) CPI then visited Zhu's manufacturing facility, which contained
12 only a few of CPI's products, and CPI was surprised that Hongye appeared to have
13 more of CPI's designs in its factory than were in Zhu's factory. (*Id.* ¶ 18.) Faherty
14 told CPI that Zhu's factory was only manufacturing CPI's products, not competitors'
15 products. (*Id.* ¶ 19.)

16 Plaintiffs allege Faherty and Zhu arranged the manufacture of "knock offs" of
17 CPI's original designs and products to sell to Plaid and other retailers. (*Id.* ¶ 22.)
18 Plaintiffs allege the only way the Hongye factory would have access to CPI's
19 products is if a retail buyer or Faherty provided the designs to the factory. (*Id.* ¶ 32.)
20 Plaintiffs allege Michaels was buying the knock-off products from the Hongye
21 factory. (*Id.*) In support, Plaintiffs allege Michaels purchased products from CPI for
22 many years, but as of October 2014, "was buying very little from CPI" yet still selling
23 products. (*Id.* ¶ 46; *see, e.g.*, ECF No. 232-2, at 14–22 (images of products being
24 sold in Michaels' stores in 2014 and 2015).) Plaintiffs also allege CPI never sold
25 wood alphabets to Michaels, yet Michaels has sold CPI's wood alphabets in its stores.
26 (*Id.*) Similarly, Plaintiffs allege Hobby Lobby purchased knock-offs of CPI's
27 products through Faherty. (*Id.* ¶ 51.)

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II. LEGAL STANDARD

A complaint must plead sufficient factual allegations to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept all factual allegations pleaded in the complaint as true and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations, rather, it must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A Rule 12(b)(6) dismissal may be based on either a ‘lack of a cognizable legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’” *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

III. ANALYSIS

Defendants’ first argument is that Plaintiffs engage in improper “shotgun pleading.” (Mot. at 13–14.) Rather than analyze the Complaint as a whole under this allegation, the Court will analyze the clarity and specificity of the allegations in its analysis of each cause of action below.

A. Copyright Infringement

The Court previously dismissed Plaintiffs’ copyright infringement claims because Plaintiffs had not demonstrated “that the owner of the copyrights at issue—CPL—registered the copyrights with the Copyright Office before initiating this

1 infringement action.” (Prior Order at 10.) The Court then denied Plaintiffs’ motion
2 for reconsideration on the issue. (ECF No. 231.) At this point, it must be clear to all
3 Parties that the claims have been dismissed and Plaintiffs are unable to cure the issue
4 of prior registration of the copyrights. In the second amended complaint, Plaintiffs
5 include the copyright claim “only for completeness.” (SAC at 1 n.1.) The claim
6 remains dismissed; thus, the Court does not analyze Defendants’ Motion to Dismiss
7 the copyright claim.³

8 **B. Trade Dress Infringement / False Designation of Origin**

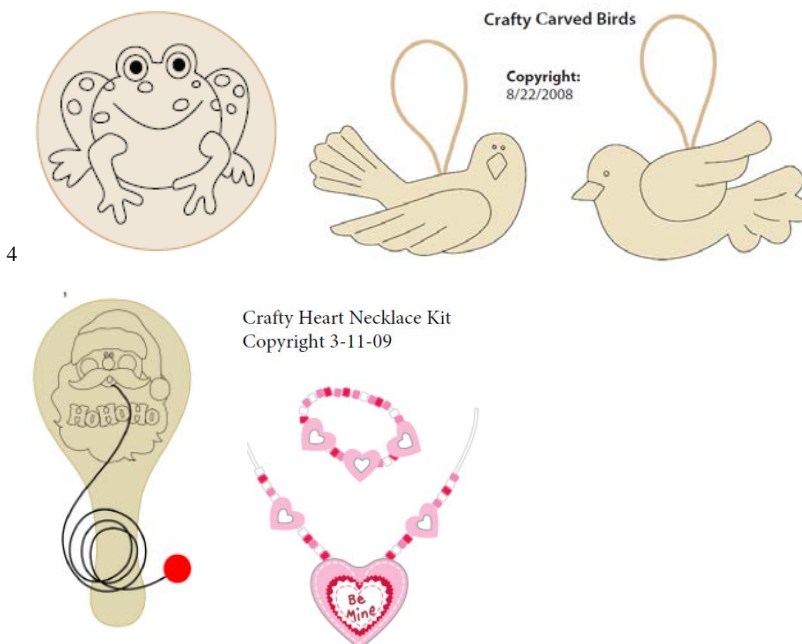
9 “Trade dress refers generally to the total image, design, and appearance of a
10 product and ‘may include features such as size, shape, color, color combinations,
11 texture or graphics.’” *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257
12 (9th Cir. 2001) (quoting *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819,
13 822 (9th Cir. 1993)). To plead a claim for trade dress infringement, a plaintiff must
14 allege: (1) that its claimed dress is non-functional; (2) that its claimed dress serves a
15 source-identifying role either because it is inherently distinctive or has acquired
16 secondary meaning; and (3) that the defendant’s product or service creates a
17 likelihood of consumer confusion. *Id.* (citing *Disc Golf Ass’n, Inc. v. Champion*
18 *Discs, Inc.*, 158 F.3d 1002, 1005 (9th Cir. 1998); *Fuddruckers, Inc. v. Doc’s B.R.*
19 *Others, Inc.*, 826 F.2d 837, 841 (9th Cir. 1987)).

20 Defendants move to dismiss Plaintiffs’ trade dress claim because “Plaintiffs
21 fail to identify a protectable trade dress.” (Mot. at 15.) Plaintiffs claim their trade
22 dress is their “original designs and products.” (SAC ¶ 61.) As examples of trade
23 dress, Plaintiffs point to “all of the designs and products depicted” in Exhibits A
24 through H and U. (*Id.*) The referenced exhibits include hundreds of pictures of
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26 ³ Defendants request the Court sanction Plaintiffs for including the copyright claim in the second
27 amended complaint or award Defendants their attorney’s fees spent responding to the claim. (Mot.
28 at 9.) Although it was admittedly unnecessary for Plaintiffs to include the copyright claim in the
operative complaint, Defendants were not required to spend substantial time moving to dismiss the
claim. The Court finds sanctions and an attorney’s fees award are unnecessary.

1 Plaintiffs’ products. (ECF Nos. 232-2 to 232-9 and 232-22 to 232-23.) Plaintiffs
2 include no further details as to what the general “design” of the products entails.
3 Plaintiffs include examples of certain features of various products that they allege to
4 be non-functional, for example “the shape and look of the hair and ears” of a vampire-
5 shaped wooden mask. (*Id.* ¶ 68; ECF No. 232-2, at 13.) But Plaintiffs are not
6 alleging their protectable design is based on the distinct “hair and ears” features. Nor
7 could it, as all products in the referenced exhibits are different and not every product
8 has “hair and ears.”

9 In viewing the pictures Plaintiffs attach as “examples” of their trade dress, it
10 is immediately clear to the Court that the products are all different. The products’
11 only similarity is that they are crafts or decorations. But it is beyond debate that the
12 products are still vastly different in terms of looks and design. Plaintiffs’ products
13 include a yoyo with a frog etched on the top; a hanging bird ornament; a wooden
14 paddle with a ball attached to it by a string; a fabric heart necklace—and the list goes
15 on. (ECF No. 232-2.)⁴ The clear differences in the “design” of the products are an
16 issue.



1 In *Walt Disney Co. v. Goodtimes Home Video Corp.*, 830 F. Supp. 762, 766
2 (S.D.N.Y. 1993), Disney sought to protect the packaging it used for seventeen
3 videocassettes. The court explained that because Disney sought protection for a line
4 of products, Disney bore “a burden which most plaintiffs alleging trade dress
5 infringement do not need to carry . . . Disney must establish that its videocassette
6 packages have a consistent overall look.” *Id.* at 766. The *Disney* court was the first
7 to set forth the “consistent overall look” standard. *See also Rose Art Indus., Inc. v.*
8 *Swanson*, 235 F. 3d 165, 172 (3rd Cir. 2000) (adopting the “consistent overall look”
9 standard when the plaintiff seeks protection for a series or line of products). The
10 “consistent overall look” test requires the trade dress convey “a single and continuing
11 commercial expression.” *Id.* at 173.

12 The Ninth Circuit has not yet adopted the “consistent overall look” test for
13 trade dress claims based on a line of products. *See Moroccan Oil, Inc. v. Marc*
14 *Anthony Cosmetics, Inc.*, 57 F. Supp. 3d 1203, 1223 (C.D. Cal. 2014).⁵ But a leading
15 trademark treatise notes,

16 When the alleged trade dress consists of a certain look or style of
17 different packaging for a number of different products, it is more
18 difficult to prove that there is a common denominator among those
19 packages which identifies plaintiff as the source. Plaintiff must prove
that its alleged trade dress has a “consistent overall look.”

20 1 McCarthy on Trademarks and Unfair Competition § 8:5.50 (5th ed. 2019). As
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22 ⁵ Other circuits have adopted the test and require the plaintiff to establish a consistent look when
23 seeking trade dress for a line of products or images. *See AM Gen. Corp. v. DaimlerChrysler Corp.*,
24 311 F.3d 796, 814 (7th Cir. 2002) (“When considering a claimed family of trade dress, courts apply
25 a ‘consistent overall look’ standard.”); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 116 (2d
26 Cir. 2001) (holding a plaintiff may only seek trade dress protection for an entire product line if it
27 establishes the “overall look” in each separate product is “consistent” and a plaintiff must
28 “articulate the design elements that compose the trade dress”); *Ale House Mgmt., Inc. v. Raleigh*
Ale House, Inc., 205 F.3d 137, 142 (4th Cir. 2000) (finding no trade dress when plaintiff’s
“configurations differ from facility to facility, denying it a single model from which to distinguish
the numerous similar configurations used by other . . . establishments”).

1 detailed below, it is clear to the Court that Plaintiffs’ products, when taken as a
2 whole, present no consistent look. And even without the “consistent overall look”
3 test, the Court finds it is insufficient for Plaintiffs to allege trade dress protection
4 over a general “design,” with no further detail, that would cover dozens of dissimilar
5 products. To grant such far-reaching, undefined trade dress protection would
6 unfairly allow inventors to claim any broad design and would leave no room for
7 competition.

8 Plaintiffs seek to protect the trade dress covering a line of products that share
9 little in common. Plaintiffs’ broadly claimed trade dress includes “the design” of the
10 products. (SAC ¶ 61.) But as a whole, the products differ vastly—they are made of
11 different materials, are different shapes, serve different purposes, and have different
12 designs. A square wooden puzzle with a Christmas tree stenciled on the top looks
13 different than a wooden vampire mask and different than a felt purse with the word
14 “Boo!” colorfully printed on the outside. (See ECF No. 232-2.) And how can the
15 design of a sticker book of owls consist of the same design as a wooden gingerbread
16 house or a wooden cube-shaped photo holder? (*Id.*)⁶ The above examples are just
17 some of the few products Plaintiffs seek to protect under one broad trade dress. (SAC
18 ¶ 61 (Plaintiffs claiming their alleged trade dress covers “all of the designs and
19 products depicted in Exhibits A–H and U”).) For the Court to grant such broad
20 protection would be simply improper.

21 Indeed, many courts require a plaintiff to “clearly articulate its claimed trade
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28 ⁶ See, e.g.,

1 dress to give a defendant sufficient notice.” *Salt Optics, Inc. v. Jand, Inc.*, No. SACV
2 10-828 DOC (RNBx), 2010 WL 4961702, *4–6 (C.D. Cal. 2010) (citing *Walker &*
3 *Zanger, Inc. v. Paragon Indus., Inc.*, 549 F. Supp. 2d 1168, 1174 (N.D. Cal. 2007)).
4 “[T]he motivation for requiring strict definition [of the product’s design] is that ‘trade
5 dress claims raise a potent risk that relief will impermissibly afford a level of
6 ‘protection that would hamper efforts to market competitive goods.’” *Walker &*
7 *Zanger*, 549 F. Supp. 2d at 1175–76 (citation omitted). Plaintiffs here do not do so,
8 and the claim for protection of trade dress of “the design” of such a wide variety of
9 products does not give a competitor sufficient notice of what is to be protected. *See*
10 *Keep a Breast Found. v. Seven Grp.*, No. 11-cv-570-BEN (WMc), 2011 WL
11 3240756, at *2 (S.D. Cal. July 28, 2011) (finding the plaintiff did not sufficiently
12 describe its trade dress when it alleged the defendant “adopted the overall look and
13 feel” of the products but plaintiff did not “describe, or even list, the elements that
14 compose the ‘overall look and feel’ of their products”); *Sleep Sci. Partners v.*
15 *Lieberman*, No. 09-04200 CW, 2010 WL 1881770, at *3 (N.D. Cal. May 10, 2010)
16 (finding that the plaintiff did not provide “an adequate definition of the elements
17 comprising the website’s ‘look and feel,’” because “[a]lthough it has cataloged
18 several components of its website, Plaintiff has not clearly articulated which of them
19 constitute its purported trade dress”).

20 For these reasons, the Court finds Plaintiffs have not sufficiently pled
21 protectable trade dress. And although Defendants ask the Court not to do so, the
22 Court will grant Plaintiffs leave to amend, to the extent Plaintiffs can more clearly
23 describe the trade dress they seek to protect. *See Creative Co-Op, Inc. v. Elizabeth*
24 *Lucas Co.*, No. CV 11-116-S-REB, 2012 WL 761736, at *3 (D. Idaho Mar. 7, 2014)
25 (finding in many cases, “courts allow leave to amend to re-state the trade dress
26 allegations in detail”). Because the Court finds that Plaintiffs do not sufficiently
27 describe their proposed trade dress, it need not reach whether Plaintiffs sufficiently
28 plead the elements of likelihood of confusion or distinctiveness/secondary meaning.

1 Accordingly, Defendants’ Motion to Dismiss the trade dress infringement claim is
2 **GRANTED** and the claim is dismissed without prejudice.

3 **C. False Designation of Origin – California Law**

4 Plaintiffs next bring a cause of action “under California law, including under
5 Cal. Bus. & Prof. Code § 14200 *et seq.* (California’s Model State Trademark Law),
6 § 17500, and under the common law protections against trade dress infringement,
7 dilution and palming off.” (SAC ¶ 96.)

8 First, as to the state law trademark claims, these claims are based on the same
9 allegations as the federal trademark claims. (*Id.* ¶¶ 95–96.) Claims for trademark
10 infringement under California law are “subject to the same legal standards” as
11 Lanham Act claims. *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1221
12 (9th Cir. 2012). Because the Court grants the Motion to Dismiss the claim of federal
13 trademark infringement, the Court also **GRANTS** the Motion to Dismiss the claim
14 of trademark infringement under state law. If Plaintiffs re-allege this claim in their
15 amended complaint, they must provide the specific statute(s) of the Model State
16 Trademark Law upon which their claim is based.

17 Second, Plaintiffs only include a bare reference to section 17500. This code
18 section prohibits any statement in connection with the sale of goods “which is untrue
19 or misleading, and which is known, or which by the exercise of reasonable care
20 should be known, to be untrue or misleading.” Cal. Bus. & Prof. Code § 17500. The
21 Complaint contains no facts behind the reference to section 17500 and Plaintiffs do
22 not discuss this cause of action at all in their Opposition. The Court **GRANTS** the
23 Motion to Dismiss any false advertising claim.

24 **D. Remaining State Law Claims**

25 Defendants argue the Court should dismiss the remainder of Plaintiffs’ state
26 law claims as preempted. The Copyright Act of 1976 expressly preempts “all legal
27 or equitable rights that are equivalent to any of the exclusive rights within the general
28 scope of copyright as specified by” the Act. 17 U.S.C. § 301(a). Two conditions

1 must be met for the Copyright Act to preempt a state law. *Sybersound Records, Inc.*
2 *v. UAV Corp.*, 517 F.3d 1137, 1150 (9th Cir. 2008). “First, the content of the
3 protected right must fall within the subject matter of copyright as described in 17
4 U.S.C. §§ 102 and 103. Second, the right asserted under state law must be equivalent
5 to the exclusive rights contained in section 106 of the Copyright Act.” *Id.* (quoting
6 *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001)). In other
7 words, “[i]f a state law claim includes an ‘extra element’ that makes the right asserted
8 qualitatively different from those protected under the Copyright Act, the state law
9 claim is not preempted by the Copyright Act.” *Altera Corp. v. Clear Logic, Inc.*, 424
10 F.3d 1079, 1089 (9th Cir. 2005). The extra element in the state law must effectively
11 change “the nature of the action so that it is qualitatively different from a copyright
12 infringement claim.” *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc.*, 7 F.3d
13 1434, 1440 (9th Cir. 1993) (quotations and edits omitted).

14 Plaintiffs’ state law claims are intentional interference with prospective
15 economic advantage and violation of California’s unfair competition law.
16 Defendants appear to assume the products are copyrightable under the first condition
17 of the *Sybersound* test, therefore, the issue becomes whether the rights under the state
18 laws are the same as the rights protected under the Copyright Act.⁷

19 **1. Intentional Interference with Prospective Economic**
20 **Advantage**

21 To establish a claim of intentional interference with prospective economic
22 advantage, a plaintiff must show

- 23 (1) an economic relationship between the plaintiff and a third party,
24 with a probability of future economic benefit to the plaintiff; (2) the
25 defendant’s knowledge of this relationship; (3) intentional and

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27 ⁷ Plaintiffs first argue that the state law claims cannot be preempted because “CPI’s copyright
28 claims have already been dismissed.” (Opp’n 11.) This is immaterial. Certain state law claims
are preempted by the Copyright Act itself, not by the specific copyright claims in a plaintiff’s
complaint.

1 wrongful conduct on the part of the defendant, designed to interfere
2 with or disrupt the relationship; (4) actual disruption or interference;
3 and (5) economic harm the plaintiff as a proximate result of the
defendant's wrongful conduct.

4 *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 713 (2007).

5 Here, the gist of Plaintiffs' claim is that Defendants knew of Plaintiffs'
6 relationship with Fuqing but "went around" Plaintiffs to get cheaper pricing on the
7 products from Fuqing, then sold the products in their stores without Plaintiffs'
8 permission. (SAC ¶¶ 103–105.) Defendants allegedly contacted Fuqing and ordered
9 Plaintiffs' designs and products directly through Fuqing rather than involving or
10 paying Plaintiffs. (*Id.* ¶ 104.) By doing so, Defendants were able to secure "factory-
11 direct" pricing from Fuqing. (*Id.* ¶ 103.) Then Defendants distributed, and/or sold
12 Plaintiffs' designs or products. (*Id.* ¶ 105.) Thus, Defendants intentionally interfered
13 with Plaintiffs' business with "customers, manufacturers, and potentially others."
14 (*Id.* ¶ 105.) Defendants move to dismiss the claim as preempted.

15 Plaintiffs' opposition to Defendants' preemption argument is a total of one
16 paragraph. (Opp'n 11.) Plaintiffs argue this claim is not preempted because it is
17 based on Defendants "interfering with CPI's exclusive relationship with its
18 manufacturer Fuqing." (*Id.*) Plaintiffs conclude the paragraph by throwing in the
19 vague and unhelpful ending: "[t]his is much more involved conduct than just copying
20 a proprietary design, and involves much different elements and factual proof." (*Id.*)

21 In *Brackett v. Hilton Hotels Corp.*, 619 F. Supp. 2d 810 (N.D. Cal. 2008), the
22 plaintiff painted three paintings and sold a limited number of prints of her works.
23 The plaintiff alleged the defendant Barry purchased her paintings, but then
24 unlawfully reproduced the works and sold copies to defendant Hilton Hotels. *Id.* at
25 815. The court found the plaintiff's intentional interference claim was not preempted
26 because "[f]ederal copyright law does not address defendants' alleged interference
27 with the contracts plaintiff entered into with other customers who purchased"
28 plaintiff's limited-edition prints. *Id.* at 822. The court noted in cases "in which a

1 third-party contractual relationship is alleged to have been disrupted by a defendant's
2 infringement of a copyright, “[m]ost courts have held that the Copyright Act does *not*
3 preempt the enforcement of contractual rights.” *Id.* (quoting *Altera Corp.*, 424 F.3d
4 at 1079). Because the plaintiff had alleged the market for her products depends on
5 there being a limited number of them, and that the market had suffered as a result of
6 the defendant’s actions, an element beyond copyright infringement existed. *Id.* at
7 823. The court found the cause of action not to be preempted.

8 But other courts have held differently, finding a plaintiff’s intentional
9 interference with economic advantage claim to be preempted in similar situations.
10 In *Media.net Advertising FZ-LLC v. NetSeer, Inc.*, 156 F. Supp. 3d 1052, 1072 (N.D.
11 Cal. 2016), the plaintiff argued the defendant infringed the plaintiff’s copyright by
12 copying plaintiff’s HTML code. Because the plaintiff and defendant were
13 competitors, the copying gave the defendant an unfair competitive advantage and
14 undermined the plaintiff’s relationship with Microsoft. The court held the plaintiff’s
15 intentional interference claim “is predicated on Defendant’s unauthorized copying of
16 Plaintiff’s HTML code, in violation of its statutory rights under the Copyright Act.”
17 *Id.* at 1073. The court distinguished the decision in *Brackett*, where the defendant
18 had permission to purchase plaintiff’s artwork but “exceeded the scope of his
19 permitted use” when he reproduced the work. *Id.* at 1072 n.10. Therefore the “core
20 violation” in *Brackett* was the breach of contractual limitation, as compared to a
21 copyright violation at issue in *Media.net*. *Id.* The *Media.net* decision is consistent
22 with other opinions where courts have held the “extra elements” in intentional
23 interference with prospective economic advantage “of showing an economic
24 relationship between the plaintiff and a third party that a defendant knew of,
25 intentionally designed to disrupt, and actually disrupted are not ‘qualitatively
26 different’ elements, and these additional requirements do not bring such a claim
27 outside the scope of Copyright Act preemption.” *Wilder v. CBS Corp.*, No. 2:12-
28 CV-8961-SVW-RZ, 2016 WL 693070, at *8 (C.D. Cal. Feb. 13, 2016) *Idema v.*

1 *Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1193 (C.D. Cal. 2001) (“Plaintiffs merely
2 claim that Defendants copied the contents of [the story] *with the intent* of interfering
3 with some unspecified possibilities that Plaintiffs would be able to sell that story to
4 one or more potential buyers. This is merely a restatement of Plaintiffs’ copyright
5 claim, and on that basis is preempted.”);

6 The main question here is, what is the nature of this cause of action?
7 “[W]hether this claim is preempted ultimately turns on whether the gravamen of
8 Plaintiff’s claim is an alleged violation of Plaintiff’s exclusive rights under the
9 Copyright Act.” *220 Laboratories, Inc. v. Babaii*, No. CV 08–6125 PSG (SSx), 2008
10 WL 5158863, *8 (C.D. Cal. Dec. 8, 2008). Plaintiffs make it clear this is about more
11 than simply Defendants interrupting the contract between Plaintiffs and Fuqing;
12 instead, the claim is about the copyrighted works themselves. Plaintiffs allege,
13 “through its acts of manufacturing, distributing and/or selling Plaintiffs’ original
14 and/or substantially similar designs or products without authorization from Plaintiffs,
15 each Defendant has intentionally interfered with Plaintiffs’ existing and prospective
16 business with these customers.” (SAC ¶ 105 (emphasis added).)⁸

17 “[F]ederal copyright laws already protect the exclusive right of distribution.”
18 *Aagard v. Palomar Builders, Inc.*, 344 F. Supp. 2d 1211, 1219 (E.D. Cal. 2004). If
19 the claim “is predicated on the unauthorized reproduction of creative work” then the
20 claim is preempted. *220 Laboratories*, 2008 WL 5158863, *8; *see also TV One LLC*
21 *v. BET Networks*, No. CV 11-8983 MMM (Ex), 2012 WL 13012674, at *10 (C.D.
22 Cal. Apr. 2, 2012) (finding preemption when plaintiff’s tortious interference claim
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24 ⁸ In their opposition, Plaintiffs contradict their Complaint. They argue the intentional interference
25 claim “is based not on Defendants’ acts of ‘manufacturing, distributing and/or selling the alleged
26 copyrighted works,’ but instead on the acts of interfering with CPI’s exclusive relationship with its
27 manufacturer Fuqing.” (Opp’n 11.) The Court relies on what Plaintiffs plead in the Complaint,
28 not their explanation in the opposition.

Further, the Court notes there is no support for the allegation that Defendants manufactured
the allegedly infringing products, instead, the allegation is that they distributed and/or sold the
products.

1 was based on defendants’ “broadcast of the allegedly infringing program, the same
2 wrongful act that is the basis of its copyright infringement claim”); *Wilder*, 2016 WL
3 693070, at *6 (noting courts considering claims of intentional interference with
4 prospective economic advantage have held the claim to be preempted “when based
5 on an allegation that a defendant used a plaintiff’s idea without her authorization”).

6 Here Plaintiffs make it clear they are accusing Defendants of distributing
7 and/or selling Plaintiffs’ copyrighted designs without Plaintiffs’ authorization. (SAC
8 ¶ 105.) These rights are already protected by federal copyright law. Plaintiffs’ claim
9 of intentional interference is “predicated on” the allegation that Defendants sold the
10 copyrighted works, even though the claim also involves the element of Defendants
11 interfering with the Fuqing relationship in order to obtain those works. *See*
12 *Media.net*, 156 F. Supp. 3d at 1073; *Motown Record Corp. v. George A. Hormel &*
13 *Co.*, 657 F. Supp. 1236, 1240 (C.D. Cal. 1987) (holding “[e]lements such as
14 awareness or intent may alter the scope of the action but not its nature” and finding
15 the intentional interference claim preempted). Plaintiffs’ claim is therefore not
16 “qualitatively different” from a copyright infringement claim. *Altera Corp.*, 424 F.3d
17 at 1089. The Court finds Plaintiffs have done nothing more than “dress[] up” a
18 copyright infringement claim “to look like [a] state law claim[].” *Sybersound*
19 *Records*, 517 F.3d at 1150. For these reasons, the Court finds Plaintiffs’ intentional
20 interference claim to be preempted. The Court **GRANTS** Defendants’ Motion to
21 Dismiss the intentional interference cause of action.⁹ However, the Court grants
22

23 ⁹ Michaels also argues Plaintiffs fail to state a claim under Rule 12(b)(6) for intentional interference
24 because they have not “specifically allege[d] how Michaels interfered with Plaintiffs’ prospective
25 economic advantage.” (Reply 4.) The Court disagrees; Plaintiffs have alleged all Defendants (who
26 are retailers or distributors of craft goods) knew of Plaintiffs’ relationship with Fuqing and
27 intentionally disrupted this relationship by buying the products directly from Fuqing and
28 distributing the products without Plaintiffs’ involvement. (SAC ¶¶ 101–104.) If third party
retailer-sellers buy products directly from the manufacturer rather than the designer of the products
(so that the retailer-sellers can pay less for the products), the business relationship between the
designer and the manufacturer is disrupted. Although the claim is preempted, it contains
sufficiently plausible allegations.

1 Plaintiffs leave to amend the claim to the extent Plaintiffs can include sufficient
2 factual allegations to demonstrate the claim is not preempted.

3 **2. Unfair Competition**

4 The Ninth Circuit has explicitly found that claims of unfair competition
5 brought under California’s Business and Professions Code § 17200 are preempted if
6 they are based on rights granted by the Copyright Act. *See Kodadek v. MTV*
7 *Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1998); *see also Wild v. NBC Universal,*
8 *Inc.*, 788 F. Supp. 2d 1083, 1111 (C.D. Cal. 2011) (finding an unfair competition
9 claim preempted by the Copyright Act where the plaintiff alleged that the defendants
10 had “improperly and unlawfully taken commercial advantage of [plaintiff’s]
11 investment in his copyright works”).

12 A plaintiff properly pleads a claim for unfair competition when the plaintiff
13 alleges facts that show any unlawful, unfair, or fraudulent business act or practice.
14 Cal. Bus. & Prof. Code § 17200. A business practice is “unfair” where it “offends
15 an established public policy or when the practice is immoral, unethical, oppressive,
16 unscrupulous or substantially injurious to consumers.” *Gemisys Corp. v. Phoenix*
17 *Am., Inc.*, 186 F.R.D. 551, 564 (N.D. Cal. 1999) (internal quotations omitted).

18 Plaintiffs’ unfair competition allegation stem from Defendants’ acts
19 “constituting intentional interference with prospective economic advantage.” (SAC
20 ¶ 109.) It appears the “unfair” act is Defendants’ alleged interference with Plaintiffs’
21 relationship with Fuqing. Thus, the same findings apply for this cause of action as
22 they did for the intentional interference cause of action. The Court finds Plaintiffs’
23 unfair competition claim to be preempted and **GRANTS** Defendants’ Motion to
24 Dismiss the cause of action. As noted above, the Court grants Plaintiffs leave to
25 amend the claim.


26 **IV. CONCLUSION**

27 For the foregoing reasons, the Court **GRANTS** Defendants’ Motion to
28 Dismiss in its entirety. However, the Court grants Plaintiffs leave to amend the

1 complaint. As noted, the copyright claims remain dismissed, and if Plaintiffs choose
2 to leave the claims in the complaint “for completeness,” Defendants need not again
3 move to dismiss them. Plaintiffs are granted leave to amend their trade dress claims.
4 Finally, the Court will grant Plaintiffs one final opportunity to amend their intentional
5 interference and unfair competition claims to the extent they can show the claims are
6 not preempted. Plaintiffs may file an amended complaint on or before July 8, 2019.

7 **IT IS SO ORDERED.**

8 **DATED: June 10, 2019**

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10 
11 **Hon. Cynthia Bashant**
12 **United States District Judge**
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